

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE:) Case No. 01-01139 (JKF)
) (Jointly Administered)
W.R. GRACE & CO., et al.,)
) Multipurpose Room
) 824 Market Street
Debtors.) Wilmington, Delaware 19801
)
)
) April 22, 2008
) 11:40 A.M.

TRANSCRIPT OF HEARING
BEFORE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Debtors: Pachulski Stang Ziehl & Jones
By: JAMES E. O'NEILL, ESQ.
919 North Market Street, 16th Floor
Post Office Box 8705
Wilmington, Delaware 19899-8705

Kirkland & Ellis,
By: DAVID BERNICK, ESQ.
THEODORE FREEDMAN, ESQ.
JANET BAER, ESQ.
200 East Randolph Drive
Chicago, Illinois 60601

ECRO: NICOLE SCHAEFER

TRANSCRIPTION SERVICE: TRANSCRIPTS PLUS
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Facsimile: 215-862-6639
e-mail CourtTranscripts@aol.com

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Appearances:
(Continued)

For the PD Committee: Ferry Joseph & Pearce, PA
By: THEODORE TACCONELLI, ESQ.
RICK S. MILLER, ESQ.
JAY SAKALO, ESQ.
824 North Market Street, No. 904
Wilmington, Delaware 19899

Bilzin Sumberg Baena Price
& Axelrod LLP
By: SCOTT BAENA, ESQ.
Wachovia Building
200 South Biscayne Boulevard
Suite 2500
Miami, Florida 33131-5340

For Official Committee: Stroock & Stroock & Lavan LLP
By: ARLENE KRIEGER, ESQ.
180 Maiden Lane
New York, New York 10038-4982

For the ZAI Claimants: Sullivan Hazeltine Allinson LLC
By: WILLIAM SULLIVAN, ESQ.
4 East 8 Street
Wilmington, Delaware

Richardson, Patrick, Westbrook
& Brickman, LLC
By: EDWARD J. WESTBROOK, ESQ.
1037 Chuck Dawley Blvd., Building A
Mount Pleasant, SC 29464

For the Washington
Class: The Scott Law Group, P.S.
By: DARRELL SCOTT, ESQ.

For the ACC: Campbell & Levine
By: MARK HURFORD, ESQ.
1201 Market Street, 15th Floor
Wilmington, Delaware 19801

Caplin & Drysdale, Chartered
By: PETER LOCKWOOD, ESQ.
One Thomas Circle, N.W.
Washington, District of Columbia 20005

Appearances:
(Continued)

For Future Claims
Representative:

Orrick
By: ROGER FRANKEL, ESQ.
Columbia Center
1152 15th Street, N.W.
Washington, D.C. 20005-1706

For the Crown:

Womble Carlyle Sandridge & Rice, PLLC
By: FRANK MONACO, ESQ.
222 Delaware Avenue, Suite 1501
Wilmington, DE 19801

Canadian Department of Justice
By: JACQUELINE DAIS-VISCA, ESQ.

For the Canadian ZAI
Claimants:

The Hogan Firm
By: DANIEL K. HOGAN, ESQ.

MICHELLE BELENJAY, ESQ.

For Unsecured
Creditors' Committee:

Duane Morris, LLP
By: RICHARD RILEY, ESQ.
1100 North Market Street, Suite 1200
Wilmington, Delaware 19801

TELEPHONIC APPEARANCES:

Robert Guttmann, Christina Kang, Christina Skubic, Daniel Silver, Matthew Siaker, Terence Edwards, Debra Felder, Elizabeth Carbraser, Mark Shelnitz, Marion Fairey, William Corcoran, Arlene Krieger, Natalie Ramsey, James Rieger, Jeanna Rickards, Walter Slocombe, Leslie Kelleher, Curtis Plaza, Lewis Kruger, Michael Dierkes, Mark Plevin, Matt Doheny, Alex Mueller, Douglas Cameron, David Bean, John Phillips, Shane Spencer, Bernard Bailor, Matthew Russell, Elihu Inselbuch, Jerry White, Kim Christensen, Rajeev Narang, David Parsons, Ari Berman, Martin Dies, Matthew Kramer, Andrew Craig, Brian Kasprzak, James Restivo, Robert Horkovich, Daniel Speights, Peter Shawn, Mari Murray, Guy Baron, Richard Levy, Catherine Chen, Elizabeth Devine, Jason Solganick, Kirk Harley, Elizabeth Esayian, Lindsey Hoelzle, Christopher Candon, Leslie Davis, Alan Madian and Beau Harbour.

1 THE COURT: This is the matter of W.R. Grace,
2 Bankruptcy Number 01-11139. Participants by phone: Robert
3 Guttmann, Christina Kang, Christina Skubic, Daniel Silver,
4 Matthew Siaker, Terence Edwards, Debra Felder, Elizabeth
5 Carbraser, Mark Shelnitz, Marion Fairey, William Corcoran,
6 Arlene Krieger, Natalie Ramsey, James Rieger, Jeanna Rickards,
7 Walter Slocombe, Leslie Kelleher, Curtis Plaza, Lewis Kruger,
8 Michael Dierkes, Mark Plevin, Matt Doheny, Alex Mueller,
9 Douglas Cameron, David Bean, John Phillips, Shane Spencer,
10 Bernard Bailor, Matthew Russell, Elihu Inselbuch, Jerry White,
11 Kim Christensen, Rajeev Narang, David Parsons, Ari Berman,
12 Martin Dies, Matthew Kramer, Andrew Craig, Brian Kasprzak,
13 James Restivo, Robert Horkovich, Daniel Speights, Peter Shawn,
14 Mari Murray, Guy Baron, Richard Levy, Catherine Chen, Elizabeth
15 Devine, Jason Solganick, Kirk Harley, Elizabeth Esayian,
16 Lindsey Hoelzle, Christopher Candon, Leslie Davis, Alan Madian
17 and Beau Harbour.

18 I'll take entries in court, please.

19 MR. BERNICK: Good afternoon, Your Honor. David
20 Bernick for Grace.

21 THE COURT: Anyone else for Grace entering an
22 appearance?

23 MR. O'NEILL: Good afternoon, Your Honor. James
24 O'Neill for Grace.

1 MR. FREEDMAN: Theodore Freedman for Grace.

2 MS. BAER: Janet Baer for Grace.

3 MR. BAENA: May it please the Court. Good morning,
4 Your Honor. Scott Baena and Jay Sakalo for the PD Committee.

5 MS. KRIEGER: Good morning, Your Honor. Arlene
6 Krieger from Stroock on behalf of the Official Committee of
7 Unsecured Creditors.

8 MR. WESTBROOK: Good morning, Your Honor. Ed
9 Westbrook for the ZAI Claimants.

10 MR. SCOTT: Good morning, Your Honor. Darrell Scott
11 on behalf of the Washington Class.

12 MR. LOCKWOOD: Good morning, again, Your Honor.
13 Peter Lockwood on behalf of the ACC.

14 MR. FRANKEL: Good morning, Your Honor. Roger
15 Frankel on behalf of David Austern (phonetic), the future
16 claims representative.

17 MR. MONACO: Good morning, Your Honor. Frank Monaco
18 for the Crown. Your Honor, I also introduce my co-counsel,
19 Jacqueline Dais-Visca, she's from the Canadian Department of
20 Justice.

21 THE COURT: Thank you.

22 MR. HOGAN: Good morning, Your Honor. Daniel Hogan
23 on behalf of the Canadian ZAI Claimants. With me, Your Honor,
24 is Michelle Belenjay (phonetic) from the firm up in Canada.

25 THE COURT: Thank you. Mr. Bernick?

1 MR. BERNICK: Your Honor, I think we have six items
2 on the agenda today, and all of them relate to the ZAI matter.
3 We've made -- we've had some informal contacts in anticipation
4 of the hearing because we know that Your Honor has a tight time
5 table today given the number of matters that have to be
6 considered. And I think that -- I think that I would propose,
7 subject to -- I don't know we have a firm agreement, but what I
8 would propose is that the debtors start out -- I have a
9 relatively short statement to make that I don't think will take
10 very long. And then I suppose people who have other ideas,
11 other motions should go, and then we'll probably -- I'll
12 probably then have a more extended response to the different
13 issues that had been -- have been raised. And then if people
14 want to have further argument in response to my response, I
15 suppose that a certain amount of that's inevitable, albeit at
16 that point I think we'll probably be short on time.

17 But I -- I would -- I'd like to emphasize that my
18 initial remarks will be -- will be pretty short and that I do
19 -- I'm not going to try to anticipate everything else that
20 might be out there. I'm just going to try to give an overview
21 report.

22 THE COURT: All right.

23 **(AUDIBILITY IS POOR - EXTREMELY DIFFICULT TO HEAR DURING MR.**
24 **BERNICK'S PRESENTATION -- AT TIMES INDISCERNIBLE)**

25 MR. BERNICK: So, if that's satisfactory with the

1 Court, then I'll just -- I'll just go ahead and proceed.

2 Your Honor, I think that there -- we do have a bunch
3 of motions, but they're -- they all share some common features.
4 First, they're all directed to how this case -- how this issue
5 should be managed. Essentially it's a case management series
6 of motions.

7 They all, in that respect, are directed to in varying
8 degrees and in varying context to the Court's discretion.
9 There are some hard and fast legal tests that are out there,
10 but an awful lot of the motions really call for the Court to
11 exercise discretion.

12 And the four most objective, therefore, I believe
13 really governs all these motions is the objective of how to
14 advance this case towards resolution. And in that respect, I
15 think that the essential choice that the Court is presented
16 with is what I call almost a geometric choice. By that, I mean
17 given where we are today, and given the confirmation that we
18 all hope to -- hope will occur, what's the path that's taken
19 between today and confirmation? And essentially our option,
20 what we believe is the appropriate path, is the shortest
21 distance, it's a straight line. Whereas I believe that the
22 proposals that you'll hear in the context of the other motions
23 call for a more complex arrangement, and in many cases, one
24 that doesn't actually lead back to confirmation, but assumes
25 that there's activity post confirmation, perhaps for a very

1 extended period of time.

2 So, what I want to do in my initial remarks is to
3 talk about that -- talk about that straight line, and then
4 contrast it with the other proposals --

5 THE COURT: Mr. Bernick, excuse me. Okay. Thank
6 you.

7 MR. BERNICK: And if I can ask the Court's indulgence
8 -- so, where are we today with respect to ZAI? We're at a
9 point where we have essentially a small number of claims, I
10 believe it's less than ten claims, that are ZAI claims and are
11 before the Court. And with respect to those ten claims, we
12 also have the determination of the very central issue, which is
13 the science issue. And as the Court's well aware, we spent the
14 better part of really several years, taken all the way back to
15 a process that really began in '02 and several million dollars
16 worth of estate assets, (indiscernible) was developed.

17 The point that we want to get to is -- again, I
18 believe (indiscernible) -- at a certain point today, we'll want
19 to talk about that. But I believe that what we're going to
20 (indiscernible) is that we aim for a confirmation hearing the
21 first part of January, we have specific dates to propose
22 (indiscernible).

23 THE COURT: Right, I thought we provided dates.

24 MR. BERNICK: You --

25 THE COURT: Okay.

1 MR. BERNICK: (Indiscernible) but we're subject to
2 our saying we want them.

3 THE COURT: Oh.

4 MR. BERNICK: We want them.

5 THE COURT: All right.

6 MR. BERNICK: Again, I think that in terms of a
7 disclosure statement hearing, as I indicated to Roger Frankel,
8 who's here for future representative, we know he has a conflict
9 that nobody (indiscernible). So, it's not going to be in
10 September, maybe earlier than that, but more likely early
11 October for disclosure statement hearing.

12 THE COURT: All right.

13 MR. BERNICK: So, that's we're actually going with
14 the case.

15 Now, the only -- the best and highest prospect for
16 getting of to the end of the day with respect to confirmation
17 is to give fruition to the agreement in principle
18 (indiscernible) between the debtor and the Asbestos Claimants'
19 Committee, futures representative, and the Equity Committee.
20 And that agreement, as Your Honor is well aware, was very, very
21 actively negotiated, the economics of that agreement were gone
22 over so that Mr. Ostrick (phonetic) was satisfied -- I know
23 he'll be able to represent to the Court he got the last dollar
24 that was (indiscernible).

25 As a consequence of the (indiscernible), the company

1 (indiscernible), it's very important that other matters that
2 are still pending in this case be treated in a certain way
3 (indiscernible). And one of those matters that's
4 (indiscernible) is through (indiscernible). The plan -- the
5 (indiscernible) as a condition for confirmation that the ZAI
6 claims will be dealt with through an estimating or if the
7 parties can reach an agreement to treat it in some other
8 fashion that is consistent with and enables us to bring the
9 agreement and the principle in the plan home, there may be
10 another path. But at the least, we (indiscernible) there has
11 to be some (indiscernible).

12 So, what's the straight path? Well, the straight
13 path between today and getting to a confirmation where we
14 reserve and implement the agreement in principle that's been
15 reached, takes us down to relevantly (indiscernible). We need
16 to have, first of all, a number of claimants, X claimants times
17 Y dollars in order to give us the estimate (indiscernible)
18 confirmation. So, we really have two components. Who are the
19 ZAI claimants, and what other claims (indiscernible). Those
20 are two very simple components.

21 And in the past exist, under the Rules, they're
22 getting us to the point where we have that estimate, the ZAI
23 liability, are really threefold:

24 We can litigate through a judgment;

25 We can estimate for purposes of determining which of

1 those claims that are going forward, what are they worth for
2 distribution purposes;

3 Or we can settle. And of course, I know that Your
4 Honor would always like -- everybody would like to see this
5 settle.

6 Those are the options, they're all available to us.
7 But each and every one of those options depends vitally on this
8 taking place in the bankruptcy process, utilizing the tools
9 that are uniquely available (indiscernible). What do I mean by
10 that? It is only in bankruptcy that we can find out who the
11 present claimants really are. That's the only place it can be
12 done. You could bar date by having people actually show up.
13 Yes, we can have estimates, we can extrapolate from the survey,
14 all kind of statics will be brought to bear, but they will all
15 be imperfect, they will have extremely ranges of confidence
16 (indiscernible). But in bankruptcy, we don't have to worry
17 about doing that. We can just say, people, show up. And once
18 they show up, we then also have some things that are available
19 to us in bankruptcy that are uniquely available to us in
20 bankruptcy to enable us to figure out what's the best path to
21 get through an estimate, and what are they?

22 We can either litigate with respect to those
23 claimants. We can say, okay, there's a determination with
24 respect to the science issue on these ten claims or whatever.
25 We're going to move for summary judgment with respect to all of

1 these other claimants, with respect to exactly the same issue.
2 And people object, or they want to come back and say the motion
3 can be denied, they can have that opportunity, and if, in fact,
4 they come back and do that, we can then get a very orderly and
5 simple process in getting to the point (indiscernible) a
6 litigated result.

7 We can take the same path through estimation. Now,
8 in estimation and litigation (indiscernible) are very different
9 than bankruptcy because we have the ability to keep everybody
10 there and treat them according to the same protocol and the
11 same rules. It's the only place in our jurisprudence -- our
12 judicial system where we get the ability for a unitary
13 consolidated proceeding, that's by both litigation and
14 estimation. With estimation, we can do even more. We can have
15 an estimation to follow the Federal Rules of Evidence and
16 Federal Rules and Civil Procedure that also permits the Court
17 to do things that couldn't be done in ordinary litigation,
18 including extrapolation. And -- and we have settlement. Why
19 is settlement enhanced by the bankruptcy process? Because if
20 we have a bar date, and we have the claimants come forward, we
21 know exactly who they are and we can enter into settlement
22 discussions pertaining to those people specifically as a
23 defined number represented by counsel, or those claimants. So,
24 that respect, this is a very tight channel, this is a very
25 tight bankruptcy specific channel and everything in it fits,

1 and each part of it depends on the prior part. We depend on
2 getting identification of real claimants, not hypothesized
3 claimants, not claimants that need to do anything in order to
4 be, quote, "included." We need those claimants, and then we
5 need a process for keeping them consolidated around this
6 constellation of (indiscernible). And I believe that all of
7 these things are possible in a relatively simple term that
8 create a bar date, then to litigate or estimate, or settlement
9 all in time for that confirmation hearing, and we resolve yet
10 another issue and we keep this case going forward towards
11 confirmation (indiscernible).

12 Now, (indiscernible) that you're going to hear about
13 in a moment entail? Well, they all entail deviating from this
14 very robust path, this path that is specifically called for and
15 enabled by the bankruptcy process, and nowhere else. They're
16 all designed to take us away from that path. So, we have
17 Proposal 1, which is let's take the claim as to which we
18 already have a determination, and have an entry of judgment so
19 that they can then be appealed. Well, the first thing we know
20 is that that path is never going to get done by the time of any
21 kind of (indiscernible) confirmation. That's a path that, you
22 know, see you later, maybe at some point in the future we'll
23 learn about what happened there, there's no certainty, there's
24 no definition of the liability, there's nothing. And that
25 entry is now with respect to a handful of claims whereas if

1 (indiscernible) with respect to all personal injury -- all --
2 all claims that are being made to property damage associated
3 with the bar date.

4 It is also partial, not only with respect to number,
5 it is partial with respect to issue. Because there are other
6 issues that I know that they -- the ZAI claimants say that they
7 want to raise. Why not get them (indiscernible) so it's not
8 being taken up to appeal, and it is further an appeal that was
9 already sought earlier in this case, flatly rejected by Judge
10 Buckwalter when he said there is no reason why you need to
11 (indiscernible).

12 Then we have the idea that says that, no, we're not
13 going to have an entry of judgment, let's retain a bunch of
14 experts who are going to advise the Court on the question of
15 how many claims there are. Well, that's a way of saying, you
16 know, gee, we can look in the microscope and count off the
17 little particles or we can not look in the microscope, but have
18 people do a survey in order to figure out how many particles
19 are under the microscope. Why would you want to do that? Why
20 would you want to avoid looking at the data, which only comes
21 out of this process here with the bar date, and serve as a
22 perpetuating in controversy that's never going to get resolved.
23 We already know that there's going to be a (indiscernible),
24 we'll all just do it amongst the experts, and any expert that
25 comes in to offer a, quote, "independent opinion" is going to

1 be subject to cross examination which will then show exactly
2 how broad (indiscernible) are. So, this is a recipe that, yes,
3 produces a number. But it produces a number that immediately
4 will say we got a huge question (indiscernible). This is not
5 to enhance the cost of (indiscernible) lead to another --
6 another debate.

7 So, we then have the last (indiscernible). We then
8 have the class proposal. Now, the class proposal is a proposal
9 that says we're not going to replace everything that we've
10 talked about here. We're not going to have X claimants, we're
11 going to have a class. We're not going to know who the real
12 people are who are going to step forward. But then, are we
13 going to be able to settle on the basis of knowing who -- how
14 many people are out there? The answer to that is clearly no
15 because we'll be speculating who actually is somebody coming
16 forward, who will be able to litigate. Well, of course, we
17 could litigate, but how is litigation going to advance the
18 cause. And the reason that we know the litigation is not going
19 to advance the cause, and the destination are not going to
20 advance the cause is they're not going to get in the way of
21 those things. Why? Because the very first thing that's going
22 to happen if we have a class is that we're going to have an
23 appeal and was the class properly certified.

24 Federal Class Action Rules were specifically amended
25 to nip interlocutory appeals precisely to determine before you

1 go over and assume the class for purposes of everything in the
2 case that the class is properly certified to begin with. The
3 fact that the Barbanti class doesn't change the picture, it
4 exacerbates the problem. We're now going to have a Washington
5 Class, (indiscernible) Washington is going to tell us what the
6 rest of the world looks like? And the Washington class, if it
7 were adopted or recognized here, would still be subject to the
8 same appeal. So, the idea of a class proposal is a proposal
9 that was designed inevitably to produce delay. And it's a
10 proposal that, Your Honor, frankly when we went back to this
11 before, I remember vividly, in March of 2002, there were
12 massive briefs, there were all kinds of people present here,
13 not here, but in Pittsburgh, for a very substantial argument on
14 this very issue. And what Your Honor said then in March, and
15 then again in April, and then again in May, all the same
16 (indiscernible) if we're successful, this is Page 64 of the
17 March 18th transcript, or if you're successful on the
18 scientific side, (indiscernible) you were actually making this
19 proposal for the first time (indiscernible), it doesn't matter
20 how many potential people are out there, they're not going to
21 be a class, they're not going to have claim. Then, again, in
22 April, I don't have to address it, it is the class
23 (indiscernible) shows me that the debtor is going to have
24 liability. We can then go on later on to exactly the same
25 proposition came up every single month, and every single month

1 Your Honor was totally consistent with just that if we went
2 forward and did this science exercise that you have now done,
3 and it turns out that you didn't find that there was a basis
4 for having liability, there was no point in pursuing the idea
5 of (indiscernible) proposal. And nothing has changed since
6 that time (indiscernible). One is that we have that
7 determination. And, two, is that we now have a plan that can
8 be -- we believe can be confirmed in a relatively short period
9 of time where the fact they're (indiscernible) a class does
10 exactly the opposite of what the term sheet contemplates and
11 introduces uncertainty and introduces delay and introduces a
12 factor that will create a cloud over this reorganization
13 because the condition in the term sheet is not met, and we now
14 have a stipulation where they're looking for a class and it's
15 just -- it's going to go nowhere.

16 That then brings us to the last proposal, which is
17 lift stay. This is the one that I suppose is the -- it wasn't
18 the most amazing proposal. List stay, of course, was not --
19 this is not a new proposal. The lift stay was made by in '01,
20 back in '01. The proposal was let's go back to
21 (indiscernible), let's go back (indiscernible) of class actions
22 that was pending, I think it was in Boston. The lift stay
23 (indiscernible) while (indiscernible). And that effort was
24 injected. The lift stay motion was denied, and we were off to
25 have ZAI litigated in this case.

1 Now, it would be one thing if something ever happened
2 to litigate. It would be one thing if nothing happened in this
3 case and we simply went forward and we've now (indiscernible),
4 whatever it is. Seven years, the same basic claims and nothing
5 had occurred. That would be kind of (indiscernible).

6 But here, that's not what happened. Here we actually
7 went forward. Mr. Westbrook was appointed new counsel for the
8 plaintiffs. With respect to the ZAI trial, Mr. Scott obviously
9 also has been (indiscernible). There has been years of
10 litigation and millions of dollars spent, and we now have made
11 progress and we're pulling to make more progress.

12 So, what's the lift stay motion? The lift stays, oh,
13 now that we're on the edge of gaining a closure, and we have a
14 bird in the hand that says we want certainty with respect to
15 ZAI, we're going to go all the way back seven years to wind the
16 clock back and have a lift stay so that everybody else in the
17 country can argue that the determination that you made with
18 respect to those kind of plans has nothing to do with them and
19 their litigation could be completely unimpaired because they
20 weren't party to that (indiscernible). In a way of kind of
21 thumbing their nose in a process that they themselves have
22 participated in, participated actively, let's do it all over
23 again and pretend it never happened.

24 That's just -- that's just completely and utterly
25 responsible that they -- of the heavy duties and obligations

1 (indiscernible). So, I know we're going to have a lot of
2 detailed discussion, we're going to talk about whether the
3 Barbanti class was really on appeal, not only appeal, whether
4 the notice went out, didn't go out, we're going to hear, I'm
5 sure, a reincarnation of the argument about whether estimation
6 is the right way to take care of the issue of what these claims
7 are really worth, (indiscernible) asking for disallowance under
8 502©, all kind of other things. We can talk about all of that
9 (indiscernible).

10 But the fact that it's out there for Your Honor's
11 determination today is a basic fact about case management. And
12 it said, do we want to find out and bring the Court, the people
13 who are out there as plaintiffs, yes or no? Do we then want to
14 find out what the value of their claims is using whatever
15 vehicle is best suited and available for doing that? And do we
16 want to do it on the basis that keeps us on track of keeping
17 this case on course?

18 So, there's only one answer to that question
19 (indiscernible) every single other proposal is a way of
20 diluting it, delaying it, distracting from it. Why? Because
21 it's a game of leverage. And what it is the ZAI claimants want
22 is anything, anything of what it did, what it does or what is
23 necessary in order to bring us to the point where the agreement
24 that's been reached in principle becomes a reality. Delay,
25 distraction, different alternative proposals of all ways of

1 producing leverage (indiscernible).

2 So, those -- that's our position, and I hope we can
3 do more (indiscernible).

4 THE COURT: All right. Mr. Westbrook?

5 MR. WESTBROOK: Good afternoon, Your Honor.

6 THE COURT: Good afternoon.

7 MR. WESTBROOK: Mr. Bernick's short introduction used
8 exactly the 20 minutes that he said he'd take for his full
9 presentation. So, I hope his long response doesn't take 40
10 minutes.

11 Your Honor, I was around at the birth of asbestos
12 property damage litigation in 1981, '82, '83, 25 years ago. We
13 solved a lot of problems in those 25 years. This is the last
14 major asbestos property damage problem that there is, I
15 believe, and is going to be. And I'd like to be part of that
16 solution. We have different views as to how that solution can
17 come about.

18 I was with Arthur Miller at Harvard the other week
19 and he was giving a presentation. He said, we sometimes forget
20 what lawyers do is we solve problems, we don't just solve our
21 client's problem, we have to solve the other person's client's
22 problem.

23 How do we do that? Mr. Bernick talked today about
24 the straight line. Well, beauty's in the eyes of the beholder,
25 Your Honor. The straight line that started out for ZAI through

1 the science trial -- and, Your Honor, you know we reserve our
2 positions about the science trial proceedings, et cetera. But
3 the straight line that Your Honor set in the science trial
4 opinion was when you reached your conclusions, you said the
5 next thing we're going to do is see what claims are affected by
6 that, and the next thing we're going to do is see whether those
7 can be treated as a class action which will assist in this
8 bankruptcy. That was the straight line. We were all on the
9 straight line. In fact, when Mr. Restivo was here for Grace
10 last year, he said, Your Honor, you said that, we should get a
11 briefing schedule. We agreed we should do that. And then
12 there was some discussion about that there was some settlement
13 floating around. And, Your Honor, said, well, why don't you at
14 least look at that.

15 We looked at that. And as I told you last time, Your
16 Honor, we have made great structural progress. The problem is
17 in the dollars. But we were all on the straight line of the
18 ZAI opinion until the last status conference when Mr. Bernick
19 jumped off the curb. He said, well, there have been proposals
20 about that, and he was talking about your proposal, and he was
21 talking about our proposal, and he was talking about Mr.
22 Restivo's proposal for the further litigation, right along the
23 straight line of the ZAI science trial opinion. But he said,
24 we don't think now that that's going to be productive. We want
25 to now jump and zig-zag over the bar date.

1 We don't think, Your Honor, that that's the way it
2 should happen. We're happy that they finally, after seven
3 years, reach an agreement with Mr. Lockwood's clients. We're
4 happy to have that done. We'd like to get an agreement with
5 Grace ourselves, but the exigency of getting a resolution
6 should not trump the rights of this group of claimants who,
7 since the very early days of this litigation, Your Honor, have
8 been seeking to have the class motion heard, who, since the
9 early days of this litigation, have done nothing but tried to
10 move this ahead. And I think, you know, if there's any
11 implication that we have been trying to delay anything, it's
12 been our class motion that's been delayed, for good and valid
13 reasons, but we certainly are not coming in as Johnny Come
14 Lately's, after a bar date's been proposed, or on the eve of a
15 bar date and saying, wait a minute, let's have a science trial
16 opinion, let's look at the claims. Your Honor said we have to
17 look at the claims.

18 Now, Mr. Bernick has written up there or talked about
19 less than ten claims. He talked about, well, what we'll do now
20 is we'll go out with this notice and then the lawyers will come
21 in for these claimants, and they'll make their claims. What
22 claims is he talking about? We haven't determined that yet.

23 Mr. Bernick said that the Court has already
24 determined there's no liability. I don't think so, Your Honor,
25 not in the ZAI opinion I read.

1 THE COURT: No, I haven't determined there's no
2 liability. What I did determine is that there is no
3 unreasonable risk of harm, and that's what the science trial
4 was all about.

5 MR. WESTBROOK: Correct, Your Honor.

6 THE COURT: But that --

7 MR. WESTBROOK: Absolutely.

8 THE COURT: -- does, I think, limit, to a large
9 extent, the type of -- the issue I was attempting to get to was
10 what's this pool of people going to be, and I did not want to
11 go out with some class notice that would frighten particularly
12 elderly people in the event that there was no unreasonable risk
13 of harm. I am convinced that there is no unreasonable risk of
14 harm. And I do not see the need to frighten a large pool of
15 people with respect to property damage issues, this was a
16 property damage issue that we were addressing. So, we need to
17 figure out now how to find out who held -- who holds those
18 property damage claims.

19 MR. WESTBROOK: Absolutely, Your Honor. And to
20 determine that, and to determine if there are devices that we
21 can use that's going to assist in getting this whole thing
22 resolved.

23 Your Honor, I sent to Mr. Bernick last night -- and I
24 have for the Court, a notebook of some demonstrative aids, if I
25 can pass them to the Court.

1 (Attorneys conferring off the record)

2 THE COURT: Okay. Go ahead without them if you can,
3 Mr. Westbrook.

4 MR. WESTBROOK: Okay, Your Honor.

5 (Attorneys conferring off the record)

6 THE COURT: Okay. It might just be a method of --
7 sometimes the way the tabs are created, but that's okay.

8 (Attorneys conferring off the record)

9 THE COURT: Go ahead, Mr. Westbrook.

10 MR. WESTBROOK: Your Honor --

11 (Attorneys conferring off the record/Pause)

12 MR. WESTBROOK: Your Honor, no good deed goes
13 unpunished. I sent them to Mr. Bernick last night.

14 MR. BERNICK: You asked and I --

15 THE COURT: All right. Mr. Bernick -- Mr. Westbrook,
16 just go ahead without them, please.

17 MR. WESTBROOK: Your Honor, it's helpful to review a
18 few facts. The traditional asbestos property damage
19 litigation, which began 25 years ago, took over 20 years to
20 come to fruition. The reason that happened was because the
21 claims, the asbestos property damage claims did not all accrue
22 at the same time. They began in the early '80's. But if the
23 claims were all ripe at one moment, they'd be barred by the
24 Statute of Limitations three or four, five years after the
25 first claims were filed.

1 We spent many years litigating with W.R. Grace, and
2 Appellate Courts deciding that property damage claims do not
3 accrue until there's been contamination of the building, and
4 until the building owner knows or reasonably should have known
5 about the contamination. The Court said these claims don't all
6 come forward at one time.

7 We have to keep that in mind when we're talking about
8 the ZAI claims because Mr. Bernick has talked about claims.
9 What is he talking about? Until we determine what these claims
10 are, what will the bar dates say? Well, in their notice, they
11 say claimant, if you -- if you need to know whether you should
12 file a claim, go to your attorney. Well, if the attorney gets
13 the court records, what's the attorney going to tell that
14 person, do you have a claim or not? We need to determine that.
15 That's not a delay in tactic, that's the straight line.

16 We also, Your Honor, have got to address this issue
17 of whether class certification is appropriate. Class
18 certification solves a lot of problems, due process and
19 otherwise. I note -- in Grace's mind, class certification is a
20 big bugaboo. But, Your Honor, class certifications were
21 commonplace in the traditional asbestos property damage cases.
22 They provided a vehicle to resolve great numbers of the claims,
23 the National Schools' Class Action, the College and University
24 Class Action, the Federal Lessors' Class Action, Michigan
25 Schools, Texas Schools, there weren't a -- that isn't something

1 alien.

2 Grace says, well, but class certifications are not
3 favored in the Bankruptcy Courts. Your Honor, if you look at
4 the cases, and I've read an awful lot of them in the last few
5 months, you'll find that with the exception of those cases, and
6 I've read an awful lot of them in the last few months, you'll
7 find that with the exception of those cases where class
8 certifications are sprung at the last moment or sprung toward
9 the end of the bar date process, that the courts have been very
10 receptive to class certifications when you have small
11 claimants, unknown claimants and claimants who, more likely
12 than not, are not going to be able to pursue a claim by
13 themselves.

14 Mr. Bernick talks about, well, the lawyers will get
15 in here and Your Honor said yourself a number of years ago,
16 these claimants aren't going to be able to get lawyers to come
17 in here for a \$7,000 claim. You're going to have Joe Smith
18 from Pocatello, Idaho sending in his claim and then facing Mr.
19 Bernick who, on a good day, is a very, very, very formidable
20 opponent, on a bad day, he's a strong opponent. But that's who
21 they want to come up against. Without a class, without the
22 representation of a class, and Mr. Scott's going to talk some
23 more about the Barbanti situation, Your Honor. Without that,
24 the playing field is not level in any -- any respect. It's not
25 off the straight line, Your Honor. It's a logical issue the

1 Court said were going to determine. We want to get back on the
2 track. We'll move it along as fast as the Court wants to move
3 it along, but we think we need to get on the track.

4 Now, Your Honor is aware we have also asked that we
5 get -- get clarification, and this is somewhat in the
6 alternative. Before this thing got too far down the railroad
7 with people saying things like Mr. Bernick has now said, which
8 is the Court has determined the liability. In the -- in their
9 briefs, they say the core issue has now been resolved, there's
10 no need for Mr. Scott's Barbanti class because there are no
11 claims. The Court hasn't determined that, in our view. Before
12 we get too far down the road, or if that was going to be the
13 effect of the opinion -- Your Honor, we have the greatest
14 respect for the time the Court put into its opinion. We also
15 pointed out, Your Honor, that the history of asbestos property
16 damage is that the first look at an issue sometimes needs
17 enlightenment from the Appellate Courts. If the ZAI opinion is
18 going to be used, as Mr. Bernick has already started to wield
19 it as that cudgel, the issue's been decided. No need for this.
20 No need for a class.

21 We're willing, Your Honor, to stipulate that there
22 are claimants, and we'll bring a claimant forward, who has no
23 epidemiological evidence of it twice -- twice the risk, doesn't
24 have OSHA air levels, the things that the Court said showed
25 there was no unreasonable risk of harm, and test whether that

1 is, indeed, what makes a claim or doesn't make a claim.

2 We just don't think that it's fair to go all the way
3 down that road without that ever having been tested, and it to
4 be used by Grace as functionally final, but procedurally
5 interlocutory so we can never get an appeal.

6 THE COURT: Well, on that issue, Mr. Westbrook,
7 frankly, I don't think this Court is in a position of being
8 able to create Appellate jurisdiction for that reason. I just
9 don't think that's the function of the Court. I've issued an
10 opinion. I view that opinion as interlocutory. I view it as
11 interlocutory for the reasons that I expressed in that opinion.
12 I set up status conferences to attempt to address the issues
13 that I specifically left undecided in that opinion. That
14 happened, as I believe, back in 2006. The parties advised me
15 that they were attempting to settle. I thought that was a very
16 good thing. I still think that's a very good thing. I was
17 willing to hold off, attempting to address those other issues
18 which may be, you know, legally complex, I don't know. I
19 haven't yet had the status conference, so I don't know how
20 technical that would be.

21 But I do not think that this Court, particularly
22 after District Court has denied Appellate relief on an
23 interlocutory basis of the rulings that I've made that this
24 Court is in the position of basically dismissing a claim that
25 somebody asks me to dismiss for the purpose of creating

1 Appellate jurisdiction.

2 If, in fact, there are claims out there that meet the
3 test that I have set out in that opinion, and those claims are
4 voluntarily dismissed, that's that. They're voluntarily
5 dismissed. But this Court is not going to create a situation
6 in which I dismiss a claim at the request of a movant and then
7 have that movant turn around and say, but that was error to
8 dismiss it. I mean how do I do that? If the claimant says
9 voluntarily dismiss my claim, then it's voluntarily dismissed.
10 But I'm -- that's not the Court making an error, that's the
11 claimant deciding that the case -- the claim's going to be
12 voluntarily dismissed.

13 So, your clients can't have it both ways. Either
14 they agree that they have no right to a remedy and, therefore,
15 they dismiss their claim. Or else they have to wait the
16 outcome now because they've taken their shot at the appeal, and
17 the Judge -- the District Court has said, no, it's not ripe.

18 So, I think your best bet, folks, since this is my
19 little effort to opine, is to get back to that settlement
20 table. And I think you've got the basis for one. Section
21 524(g) affords even the benefit of a 524(g) injunction for
22 property damage claims. And this is a perfect situation for a
23 property damage type of claim.

24 I've looked at that Barbanti action. And Mr.
25 Bernick's brief, with respect to what it asks for, is on point.

1 It does not ask, in many instances, for injunctive relief.
2 It's asking, in many ways, for a fund to be set up so that
3 certain types of injunctive relief can then be funded by the
4 debtor. You know, it is a damages action. It is not an action
5 asking for injunctive relief. It's asking that the debtor fund
6 certain types of remedies.

7 If that's what the plaintiffs want, then negotiate
8 with the debtor. Put these claims -- in which case, you don't
9 need a bar date, and you don't need a class action. You can do
10 a class in the plan, which is the equivalent of a class action.
11 You can run it like a 524(g) trust, you can have people who
12 actually can substantiate that they have a damage issue into
13 the trust. You can run it through CDP. And you both have the
14 perfect solution to both of your problems: Mr. Bernick gets
15 what he wants, which is the debtor to be relieved of this
16 responsibility. And you folks get what you want, which is ZAI
17 claimants who actually have damages to be funded through
18 whatever type of trust you're able to negotiate. Now -- and
19 the class action structure through the benefit of the 524(g)
20 injunction. It works, folks. So, I don't understand what the
21 hold up is here.

22 MR. WESTBROOK: Your Honor, I think you've -- you've
23 put your finger on a very important point. And what we had
24 suggested was that as part of that process, the Court has
25 suggested that we have the non-binding bar date; that didn't

1 fly with Grace.

2 But we had suggested that as part of that exact
3 process, that in addition to whatever claimants come forward,
4 that we use the same types of estimation that they've just used
5 to settle the personal injury situation. Mr. Bernick says,
6 well, it would be statisticians. I can guarantee the Court
7 that our statistics, which Grace has, are much more robust,
8 much more statistically accurate on the homes that exist, and
9 the homes that had been demolished, and the pace of
10 renovations, than how many people are going to come forward
11 with mesothelioma in the year 2018. So, we are certainly
12 willing to do exactly what the Court has said, and we will take
13 -- certainly proceed on that basis, Your Honor.

14 Mr. Scott may want to speak a bit to Barbanti, and
15 also further on the estimation experts, Your Honor. But I am
16 certainly happy to proceed in that way, Your Honor. I think
17 that is the only type of solution that seems to work. After 25
18 years, I think it addresses the ZAI unique circumstances, and
19 also takes account of the fact of their property damage
20 character.

21 So, from my standpoint, Your Honor, I think that's a
22 marvelous suggestion.

23 THE COURT: Well, I do not want to be thought of as
24 having made a determination that it is homes that are
25 claimants. But nonetheless, some statistics as to homes that

1 have ZAI may be helpful, but I'm not sure that's the means all
2 and end all, Mr. Westbrook. I'm not making that kind of
3 finding.

4 But it does seem to me that Mr. Bernick is quite
5 correct about one thing: The Bankruptcy Code is not
6 necessarily a thing of beauty in all respects. But in this
7 particular regard, it works. And, folks, you're here. Your
8 motions for relief from stay are going nowhere. You're not
9 getting relieved from the premises of this Court. You are here
10 for a reason. The automatic stay is for the benefit of this
11 estate. You're going to stay here through this estate, you're
12 going to resolve these issues in this Court. So, that's the
13 way it's going to be.

14 MR. WESTBROOK: And we are looking for resolution.
15 Your Honor, I'll -- I'll reserve some time to come back after
16 Mr. Bernick come back, after my colleagues come back. Mr.
17 Baena has some things he wanted to say, and Mr. Scott.

18 THE COURT: Mr. Scott?

19 MR. SCOTT: I will be genuinely brief, Your Honor.

20 (Pause)

21 MR. SCOTT: May it please the Court. Darrell Scott,
22 I have been counsel for class of about 100,000 Washington
23 residents for the last seven years. And I have been on a
24 mission to convince the Court, if not the debtors, that the
25 only genuine way that they can achieve closure is by

1 recognizing that there are a number of claims which have not
2 yet accrued, but which can be represented, accounted for, and
3 discharged through equitable class remedies.

4 Recognition of a class of homeowners, not that they
5 have claims, but that they are asserting a claim, and
6 representation of that class precisely where Mr. Bernick places
7 the battleground, would permit this Court to determine and to
8 resolve that the claims are of a -- of a large community of
9 unknowing individuals who, under the substantive laws of their
10 own states, have claims which have not yet accrued, but which
11 can be accounted for, and for which programmatic remedies can
12 be provided, and then discharged. If that does not happen,
13 there will be an appeal. Because unlike Mr. Bernick, I don't
14 see the law, as he calls it, a game of leverage.

15 If those claims are not represented here, they will
16 be represented elsewhere. That is the duty I took on when I
17 was appointed as counsel to look out for the legal interests of
18 the Washington class.

19 I am not proposing a course that diverts from the
20 course that Mr. Bernick sets out. I am only arguing that what
21 he calls the tight channel -- I call it a tight noose, does not
22 exclude my clients.

23 Mr. Bernick says on appeal -- he threatened today,
24 just like he did the very time I spoke to the Court, Court, you
25 recognize that class, you know, we're going to appeal. It's

1 also true that when a Court does not recognize a class, there
2 is a right of appeal.

3 It is also the case that where that class claim is an
4 equitable claim for unified relief, and the Court does not
5 recognize that claim, it has denied that claim, and there is an
6 immediate right of appeal. I want to make clear the Barbanti
7 motion that this Court merely recognized my clients' right to
8 assert the claim, which is all we're doing, the Court's denial
9 of that right to assert the claim is not a class certification
10 question. It is a question as to whether or not that claim can
11 be brought.

12 So, if it is -- if the Court is of a mind that that
13 class should not be permitted to file its claim, then the
14 proper court -- course for this Court is to enter an order
15 disallowing that claim because it cannot be brought on an
16 individual basis.

17 THE COURT: Oh, no, wait. First of all, there's no
18 bar date. So, you know, we went through this before. Anybody
19 can file a proof of claim. There is no bar date. If your
20 client wants to file a proof of claim, the debtor will object
21 to it, we'll have litigation about it.

22 MR. SCOTT: And that --

23 THE COURT: I don't see --

24 MR. SCOTT: That's right where we are. We did file a
25 class proof of claim.

1 THE COURT: Right. And we have --

2 MR. SCOTT: We have asked for recognition of it, and
3 they have contested it.

4 THE COURT: And we -- we went through this several
5 years ago when we were attempting to determine the science
6 trial. And the issue at that point was that you wanted to pick
7 out only certain claims within a class, not the whole class, to
8 look at the science issues. And so that's what we did. We
9 looked at the science issues, rather than determining whether
10 or not all of the class within -- all of the claims within that
11 class would be covered at that time.

12 So, you know, we've been picking and choosing, sort
13 of gerrymandering what's -- to use since today is Election Day
14 in Pennsylvania, I guess that's a good word to use --
15 gerrymandering these -- these issues to a certain extent
16 because it has hopefully been advancing the ball. Then what
17 happened is a year and a half has gone by while parties
18 allegedly have been attempting to settle whether there has, in
19 fact, been productive negotiation or not, I obviously don't
20 know. I hear from time to time that there is. I've seen
21 nothing that shows me that, in fact, there has been real
22 movement. But, nonetheless, I haven't yet also seen anybody
23 moving to get things back onto a litigation agenda. So, I'm
24 assuming hopefully that there still is some movement toward
25 settlement. I do not, in any way, want to jeopardize movement

1 towards settlement. I think these issues, in order to get
2 everybody onto the same page, and get a consensual plan
3 through, probably are going to have to be settled.

4 If we need to start to marching down a litigation
5 path, then, you know, let's march. Now that the personal
6 injury things are off my calendar, I actually have days free.
7 So, if we need them for ZAI, then fine. Let's put them on for
8 ZAI and we'll march to that tune instead of the personal injury
9 tune, if that's what we need to do.

10 But I think at this point, this discussion as to
11 whether a class proof of claim should be filed really is not
12 the focus that we should be having.

13 The focus that we should be having is whether or not,
14 rather than looking at a specific class proof of claim for
15 Washington residents, all ZAI claimants, whoever they are,
16 wherever they are, should not be treated in a similar fashion
17 by the debtors' estates. And probably the way to do that is
18 through a 524(g) mechanism which resolves the debtors' issues
19 and resolves all ZAI claimants' issues in a fashion that is the
20 equivalent of what both of you are asking for.

21 Now, does it require a bar date? I don't think so.
22 Maybe Mr. Bernick wants to argue that it does, I really don't
23 believe it does. I think the 524 issues can be adjudicated
24 without that need. I'm amenable to either way, it can be done
25 either way. And maybe that's an issue for, you know,

1 estimation purposes if it's an estimation issue that will have
2 to be undertaken.

3 If it's going to be an issue where the debtor, for
4 example, says, look, our pot has to be X dollars, and that's
5 all we can afford, and you folks can do what you want with it,
6 but this is what we do. And then ZAI goes and develops the
7 TBP's and that's how it works, okay. You've got lots of
8 flexibility in a 524(g) context. Why don't you go start
9 talking to each other and use it?

10 MR. SCOTT: I agree wholeheartedly with the Court's
11 view that this is resolved through 524(g). The question is who
12 are you attempting to exclude?

13 And the past point I was only trying to make was the
14 motion before this Court is a motion to recognize an existing
15 equitable class proof of claim, and we look forward to what the
16 Court's order is with respect to that pending --

17 THE COURT: Well, I don't --

18 MR. SCOTT: -- claim.

19 THE COURT: I have looked at that complaint, Mr.
20 Scott, and I don't really see equitable relief in that
21 complaint.

22 MR. SCOTT: And I --

23 THE COURT: That's the difficulty that I have.

24 MR. SCOTT: And I understand why the Court might
25 think that, having not had the benefit of the briefing as to

1 what the nature of these claims are and the law governing the
2 claim. That was an issue that was looked into over the course
3 of three-quarters of a year by Judge Cathleen O'Connor --

4 THE COURT: All right.

5 MR. SCOTT: -- who understands Washington's equitable
6 law. And if -- if it's the Court's ruling that it is not
7 equitable, I would -- that's -- that's fine, so long as the
8 Court enters an order so that we know what we're dealing with.

9 THE COURT: I am not entering an order. What I'm
10 doing is ordering you folks to a real settlement. And we're
11 going to discuss how, when and where that's going to take
12 place. Whether it needs to be supervised or whether it's going
13 to be something that you folks are going to undertake on your
14 own. And if, in fact, it results in -- it does not result in a
15 settlement, let me say it that way, then, Mr. Scott, we are
16 going to tee up this issue for reargument. Because, frankly,
17 it was argued way too long ago for me to have enough of a
18 recollection to undertake that issue again.

19 MR. SCOTT: And I agree with those sentiments
20 wholeheartedly.

21 THE COURT: Okay. And then we will address the class
22 proof of claim.

23 MR. SCOTT: I apologize for taking so much time.

24 THE COURT: No, it's no time, thank you, I appreciate
25 the issue. Okay. Who's -- Mr. Baena?

1 MR. BAENA: May it please the Court, Scott Baena on
2 behalf of the Property Damage Committee.

3 Your Honor, with that, I'm not sure that we want to
4 sit here now and debate the wisdom of a bar date and a notice
5 program line-by-line as we intended to object to. We had a
6 very limited position in all of this. We commented on the
7 usefulness of the bar date. We commented upon the ability to
8 effectuate a bar date through the notice program that has been
9 proposed by the debtor.

10 But it sounds like the Court would like to put that
11 to the side for a moment. And we're fine with that, Judge,
12 because we -- we likewise think that there's been an
13 intermission here. The Court did very clearly in your
14 published opinion say we were going to pause now and reflect on
15 where to go from here. And we -- we haven't had that
16 convocation amongst ourselves. It just has not occurred.

17 And bringing it before the Court by way of a motion
18 to establish a bar date, if anything, takes us further away
19 from whatever it is you are hoping to accomplish through that
20 process than bringing us closer.

21 I will say this, Judge, I want to disabuse the Court
22 of any misapprehensions. This is the first time we've appeared
23 before you on a matter since the announcement of the settlement
24 with personal injury. Let me make sure the Court is aware, we
25 -- we welcome that result on -- on many levels.

1 First, without it, we couldn't get through the rest
2 of this case, that's clear.

3 And secondly, this has been a collaborative process
4 throughout between the Committees, the Asbestos Committees.
5 We're happy that our brethren have reached that result, just as
6 I'm sure they're pleased that we resolved, in large part,
7 traditional property damage.

8 Our concern here, though, is that Zonolite was among
9 the triumvirate of asbestos claims at the outset of this case.
10 It was needing the same sort of attention and resolution as the
11 other sort of asbestos claims. We put it to the end of the
12 cue. And we just wish to assure that the question as posed by
13 Mr. Bernick isn't the question that we're really trying to
14 resolve here, which is how do we do all that to get to a
15 confirmation hearing in January? That's not the calculus here.

16 Zonolite shouldn't end up like a spectator at a
17 soccer game in South America where it gets crushed at the gate
18 where everybody is trying to get to the exit. They have the
19 same vital interests in the outcome of this case, they have
20 been abiding by everybody's direction to hold their horses.
21 But they -- they're not -- they shouldn't be abbreviated in the
22 resolution of their claims, and that's what we're concerned
23 about, the process. And we didn't see that those interests
24 were advanced by a bar date.

25 So, I'll save the argument -- the specifics about why

1 a bar date doesn't work because it sounds like we're not going
2 there today.

3 Thank you, Judge.

4 THE COURT: Mr. Hogan?

5 MR. HOGAN: Good afternoon, Your Honor. Daniel Hogan
6 on behalf of the Canadian ZAI claimants.

7 I've obviously listened to your comments over the
8 last hour, Your Honor, and it definitely changes the game, as
9 it were, in terms of my client's perspective on how to proceed.

10 I will tell you, however, Your Honor, that the
11 Canadian ZAI claimants are postured quite differently from
12 these American ZAI claimants in that there's been an ongoing
13 Canadian insolvency proceeding that has paralleled this
14 proceeding before the CCAA, I think you saw that in the orders
15 that I had attached. That proceeding, as part of its mandate,
16 includes certain injunctive relief against proceeding against
17 having class actions proceed in Canada. And that was really
18 one of the mandates for us to file our motion for relief.

19 We've got overlapping injunctive relief, some of
20 which relates to Grace Canada, some of which relates to the
21 U.S. debtors here. But that court has taken a keen and active
22 interest in these proceedings and has monitored those -- these
23 proceedings through reports that have been filed by
24 representative counsel, who are, in fact, my clients.

25 Your Honor, we're -- we're fairly late to this game

1 relative to the various other ZAI claimants in that at least
2 with regard to these motions, we weren't really even brought on
3 -- brought into this issue until April 9th when the Crown filed
4 an objection, and then April 10th when the debtor filed their
5 amendment to the -- to the bar date motion to include Canadian
6 ZAI claimants.

7 And so I just want to make the Court aware, to the
8 extent it's not aware, that we are late to this party, but we
9 have active claims.

10 Another distinction that I want the Court to be aware
11 of is that representative counsel in Canada, as appointed by
12 the CCAA, is counsel that is representative of both PD claims
13 and PI claims.

14 THE COURT: Yes, I know that.

15 MR. HOGAN: And that distinction's important. I -- I
16 just want to draw the Court's attention to it because there's
17 been dialogue in this case over the years with the PD
18 Committee, they've been approached, the PI Committee. But
19 because of how representative counsel in Canada is
20 characterized as representing both those interests, they could
21 never really get any traction with either the PD Committee or
22 the PI Committee. We were essentially that round peg trying to
23 be put into that square hole, and it hasn't really worked. So,
24 we've been on the outside to a certain extent.

25 And in part, that's what precipitated our motion for

1 relief. There is a -- there is a program in Canada. There is
2 the CCAA. And the plan that was last put forth by the debtor
3 articulated that there would be a Canadian litigation protocol
4 or procedure where a Canadian court would oversee the
5 determination of the Canadian Zonolite claims. And that's
6 what, in part, precipitated our motion for relief from the
7 automatic stay.

8 The Crown is inherently involved in this process
9 because of the claims that are being asserted in Canada aren't
10 just against W.R. Grace or Grace Canada, but also are against
11 the Crown. And as you know, there's been objections filed by
12 the Crown. Those -- those claims against the Crown are
13 intertwined with the claims against Grace. They're essentially
14 indemnification claims, claims that the Crown didn't -- didn't
15 foresee the risk, it didn't prevent the risk, it didn't abate
16 the risk. In effect, promoted the risk.

17 And -- and then in addition to that, Your Honor,
18 there are some individually situated groups or class of people
19 that are distinctly different from the American Zonolite
20 claimants. Inuit-speaking individuals, the French-speaking
21 individuals, which make of a large minority of the population
22 in Canada. And so these are some of the considerations and
23 concerns that Canadian Zonolite claims have, and that we wanted
24 to get before your Court -- the Court today because it appeared
25 that what was going to happen today is, in fact, what has

1 happened, which is that the Court's looking to determine some
2 sort of universal approach to deal with the Zonolite claims.
3 And I wanted to make sure that the Court was aware that we're
4 not postured quite the same as the various other ZAI entities.

5 THE COURT: I realize the Canadian claims are not
6 quite in exactly the same position, but at least as to the
7 property damage claims, I think the bargaining positions of the
8 parties can take one of -- you know, probably many approaches,
9 but two simple ones: Either that for property damage -- and
10 I'm speaking only to property damage right now. For property
11 damage purposes, you're going to be folded into the same type
12 of approach that the American ZAI claims will have. Or that
13 you're going to have a whole separate bargaining structure with
14 the debtor and/or litigation structure through the plan,
15 however the plan proponents and you agree. That will encompass
16 either PD and/or PI claims in Canada, or just PD claims.

17 And, you know, again, I hate to keep going back to
18 Federal-Mogul because it seems that that's all I've been doing
19 today, and I'm not trying to use that as the model for be all
20 and end all, but that case did, of course, have a foreign
21 component in which there had to be a separate type of plan
22 structure because of the foreign component claims. Now that
23 was much different from what you're talking about with just
24 this one small segment of the claims, but nonetheless, there
25 was the capability of taking a look at that one particular line

1 of claims from a foreign court, and then incorporating into the
2 American plan a structure based on that foreign claim.

3 So, you know, you folks have lots of bargaining room
4 if you'd just start talking to each other. And now that the PI
5 resolution is hopefully resolved, and the PD non-ZAI claims
6 seem to be more on track, I think it's time to do that.

7 MR. HOGAN: Your Honor, you mentioned Federal-Mogul.
8 It's interesting because my clients and I, we've discussed in
9 part potentially filing a motion to create a protocol for the
10 intercore communication between the CCAA and this Court. Is
11 that something the Court would entertain?

12 THE COURT: Oh, sure. I mean I entertain all
13 motions, but whether we need it or not, you know, I don't know.
14 I think -- I think what you really need is to talk to the plan
15 components. But, yes, I mean I'm always happy to talk to my
16 brethren on other courts, I always learn a whole lot from that.
17 So, yes, there's no -- no reason I wouldn't entertain such a
18 motion. But nonetheless, I really think the issue at this
19 point is that you probably can -- can encompass what all of you
20 need in the structure of the Canadian and the American cases.
21 And exactly how you choose to do that is going to have to be a
22 matter of some bargaining, notwithstanding the slight
23 difference -- well, maybe major difference in the comport of
24 the law that applies in Canadian cases as opposed to the
25 American cases.

1 The claims treatment issues are something you can
2 bargain. How we work out the confirmation process, I don't
3 think, will be a problem. Can't -- the Canadian Court and
4 American Courts have had very friendly relations in terms of
5 confirming plans, unlike some issues that happened in Federal-
6 Mogul, that has not been the case with Justice Barlant
7 (phonetic) in other cases before.

8 MR. HOGAN: Your Honor, two other points I'd care to
9 make. They relate primarily to the notice program. One is
10 this, as we understand it, the Canadian Government, the Crown
11 has a significant database -- or database, which includes the -
12 - the -- I guess the property locations, for lack of a better
13 term, that are, in fact, -- that contain Zonolite.

14 **(AUDIBILITY IS POOR - MR. BERNICK'S IS NOT AT A FUNCTIONING**
15 **MICROPHONE -- AT TIMES INDISCERNIBLE)**

16 MR. BERNICK: Your Honor, if he wants to get into
17 that, I think that's actual (indiscernible). And -- but I
18 (indiscernible). I wonder why we're having that -- they were
19 happy, as we have said, to have changes to our notice of
20 program to accommodate facts and circumstance that are
21 (indiscernible). I don't know why it is important to have --
22 to take before the Court on something that's not even really an
23 issue that's ripe.

24 THE COURT: Yeah, I don't think the issue about
25 notice is going to be ripe for today because I don't think

1 we're going to get that far, Mr. Hogan. So, maybe --

2 MR. HOGAN: Well, I caveated it. That's -- I just
3 wanted to bring that -- and the last point, Your Honor, relates
4 to a report that I understand that the Canadian Government is
5 getting ready to issue. It's a Health Canada Report. And as I
6 understand that report, it's going to attempt to address, not
7 unlike the science trial decision addressed, the nature and
8 extent of the potential harm caused by Zonolite in individuals'
9 homes in Canada. And I just wanted the Court to be aware of
10 that because it may impact not only the negotiations, but to
11 the extent that there is a notice program, how that would play
12 out.

13 **(AUDIBILITY IS POOR - MR. BERNICK'S IS NOT AT A FUNCTIONING**
14 **MICROPHONE -- AT TIMES INDISCERNIBLE)**

15 MR. BERNICK: (indiscernible) as we understand it,
16 we've been told the fall, can't wait for the report. We
17 understand that they have addressed the same issues and were --
18 been apprized of that. We can't wait for the report to decide
19 what we're doing.

20 MR. HOGAN: Well, I was told it was June, Your Honor.
21 But June, the fall, whichever.

22 MR. BERNICK: The -- a lot of different times and I
23 think that they're being wise and deliberate about it, being
24 careful in their process. Again the fact remains, we can't --
25 we can't (indiscernible).

1 THE COURT: Okay. Well, I think at this point in
2 time, what -- I'm going to go back to what I said earlier. I
3 believe that what would be the best course of events at the
4 moment is to have you folks start talking to each other and see
5 what can happen. Whether or not you can't accommodate some
6 settlement. You know, if, in fact, you can accommodate some
7 settlement, then notice of the settlement can certainly be
8 incorporated into a disclosure statement type of notice. It
9 won't take the separate notice, and the debtor can certainly
10 save millions of dollars in the notice program because it won't
11 have to do it twice. It won't have to do it separately through
12 ZAI notices, and separately through disclosure statement
13 notice. There will be some savings that will accrue because we
14 will be able to figure out a way to do -- to do what's in that
15 notice, some notice that will, I'm sure, satisfy the ZAI
16 claimants.

17 So, you know, to the extent that the debtor is short
18 on funds, several million dollars may be able to go into a ZAI
19 pot that would otherwise go into an advertising pot. So, why
20 don't you folks talk?

21 MR. HOGAN: Your Honor, I -- I'm prepared to address
22 and be responsive to that (indiscernible) remarks, but that --
23 if that's what Your Honor wants to talk about, that's -- we'll
24 talk about it. But there some things that Your Honor ought to
25 be aware of because that is not my writing on a clean slate,

1 Your Honor.

2 THE COURT: All right.

3 MR. HOGAN: Your Honor, the Crown, I think has --

4 THE COURT: Mr. Monaco?

5 MR. MONACO: Good afternoon, Your Honor. Frank
6 Monaco for the Crown.

7 Your Honor, we filed objections to the various
8 motions because of our concerns about fair and equal treatment
9 for all ZAI claims, regardless of whether they're north or
10 south of the border.

11 I don't disagree with Your Honor's observation that
12 at least as to the PD claims, certainly there's no reason to
13 distinguish them -- Canadian claims from American claims.

14 I'd like to pick up on one thing that Mr. Bernick
15 alluded to in addressing Mr. Hogan's comments. I think it's
16 more accurate to say that the Canadian solvency proceeding is
17 not really parallel. It has ancillary jurisdiction --

18 THE COURT: Okay.

19 MR. MONACO: -- and primary jurisdiction over Grace
20 Canada.

21 THE COURT: All right.

22 MR. MONACO: And it's important, Your Honor -- I'm
23 going to stress to the Court that it's important that the
24 parties and the Court get this right because pursuant to 18.6
25 of the CCAA, which is the Insolvency Act in Canada, that the

1 decisions made here be fair and equitable so that that Court
2 can give comity, and we don't have problems down the road.

3 So, we are concerned that the treatment of all
4 claims, including the Canadian claims, be fair and equitable.

5 THE COURT: Mr. Monaco, I hope to be fair and
6 equitable --

7 MR. MONACO: I'm not --

8 THE COURT: -- with respect to the treatment of all
9 claims.

10 MR. MONACO: Your Honor, I'm not insinuating
11 otherwise.

12 And Mr. Hogan did -- he did inform the Court that
13 there are existing orders appointing the class representative,
14 as well as orders staying any actions until October 1st of
15 2008.

16 Your Honor, we are both a direct claimant and have
17 claims for contribution indemnification. The direct claims
18 result from our purchase of ZAI, which we installed -- the
19 Government installed in reserve housing and military base
20 housing, and we have incurred expenses in remediating by having
21 to seal attics.

22 We also have contribution and indemnification claims
23 as a result of being a co-defendant with Grace in the various
24 class actions that have been currently stayed.

25 Your Honor, I'd just like to sum up. What we are

1 seeking is the Court's guidance to have the Canadian treated in
2 this proceeding. I think today's hearing is a positive
3 development from the Crown's perspective, and hopefully the
4 arguments and the positions developed here will assist the
5 Court in doing so.

6 THE COURT: Well, Mr. Monaco, is the Canadian
7 proceeding look to treat the Canadian claims through the Grace
8 Canada proceeding? Or does the Grace -- does the Canadian
9 proceeding -- I guess is that mandated? Or if there is a fair
10 and equitable treatment in this proceeding here, will the
11 Canadian claims process permit the Canadian claims to be
12 treated through a agglomeration of cases --

13 MR. MONACO: Well --

14 THE COURT: -- including through the U.S. proceeding?

15 MR. MONACO: I think -- and my co-counsel can correct
16 me if I'm wrong, but I think the Canadian Court is looking to
17 this Court in the first instance to deal with these issues.

18 THE COURT: Okay.

19 MR. MONACO: I think that's -- that's the position of
20 the Canadian Court.

21 THE COURT: All right.

22 MR. MONACO: Because it's an ancillary court.

23 MR. BERNICK: And we believe that's -- that's
24 absolutely correct.

25 THE COURT: Okay.

1 MR. MONACO: And, Your Honor, one other thing I
2 wanted to confirm what Mr. Bernick said about the risk
3 assessment. It's our understanding it will be issued in the
4 fall, not June.

5 THE COURT: All right.

6 MR. BAENA: Just one comment. Scott Baena on behalf
7 of PD.

8 Just -- just for the record, Judge, I'm not sure that
9 it's ancillary or a parallel proceeding, and nothing I heard
10 today forecloses that debate. Remember, Judge, Grace Canada
11 was formed days before this case was filed. And it was formed
12 for purposes of commencing a proceeding in Canada.

13 FEMALE SPEAKERS: That's absolutely incorrect.

14 MR. BERNICK: Your Honor, I -- I -- why do we have to
15 get into this today? Mr. Baena is in a very difficult position
16 with respect to the different plaintiffs that now constitute
17 the PD claimants. Is this a statement that's being made on
18 behalf of Mr Spites (phonetic), who's got Canadian claims that
19 haven't been settled?

20 MR. BAENA: Excuse me, Judge. I was in the middle of
21 a presentation.

22 MR. BERNICK: But I have a concern that I want to
23 raise about what it is, what --

24 MR. BAENA: Raise it.

25 MR. BERNICK: -- capacity Mr. Baena is speaking.

1 MR. BAENA: Your Honor --

2 THE COURT: Do you represent the Property Damage
3 Committee.

4 MR. BAENA: I represent the Committee, Your Honor.

5 THE COURT: All right.

6 MR. BAENA: And I am not able to answer any of those
7 questions here today. And my whole point is that it's not so
8 clear what the state of that proceeding is. And I don't think
9 any discussion here today forecloses what it was.

10 THE COURT: All right. Did -- I -- Mr. Baena, I'm
11 sorry. Is that because you have some disagreement that the
12 Canadian Court is looking to this Court in the first instance
13 to resolve the claims? I just am not clear what the --

14 MR. BAENA: I'm not -- you know, we're hearing all
15 sorts of versions about the interaction between the two
16 proceedings, and it's just not clear. It's not been
17 demonstrated what the interactive nature of those proceedings
18 are.

19 THE COURT: Oh, okay.

20 MR. BAENA: That's all.

21 THE COURT: All right.

22 MR. BAENA: Remember, this was all under the Rules
23 that existed prior to the amendments -- the BAPCPA amendments,
24 and it was different then to -- you know, to commence an
25 ancillary proceeding.

1 THE COURT: Yes.

2 MR. BAENA: You had to commence one here. They
3 didn't commence one here. That -- that's the problem.

4 THE COURT: All right. Mr. Bernick?

5 MR. BERNICK: Yes. I -- I want to deal with the --
6 we used to say that the -- well, I want to deal with the kind
7 of -- it's not a gorilla, but it's an animal of some not
8 insignificant dimension that's in the room. And it's been put
9 in the room by suggestions that have been made repeatedly by
10 Mr. Westbrook and by others, and indeed, for that matter, by
11 Your Honor's response to it, which is that it's settlement. It
12 is, you know, how to resolve this thing. And the suggestion
13 that's been made by Mr. Westbrook is that things were kind of
14 going along and they were all honky-dory and Mr. Restivo is in
15 there say, amen, amen, amen, and then all of a sudden, it got
16 off track.

17 THE COURT: I don't think I said any of that.

18 MR. BERNICK: No, Your Honor didn't say any of that.
19 But that's what was suggested to Your Honor. And I -- Your
20 Honor has raised the question, well, and properly so, what was
21 happening during this whole period of time when Your Honor was
22 prepared to go forward and you ask for the status conference to
23 say what's going to happen here, and there was no real status
24 conference because the report back to Your Honor is that we're
25 having discussions. And will now assure Your Honor of a few

1 things. I suppose you'll have to take them with a grain of
2 salt in the same fashion that I'm kind of asking that Your
3 Honor take with a grain some of the other observations that
4 have been about the same process. And maybe the very fact that
5 we have differing views is exactly what one of the problems was
6 with the process.

7 But all of the things that I think Your Honor
8 expected that would be done during this interim period or
9 thought that would be done were done. That is there were
10 active settlement discussions involving Mr. Westbrook,
11 involving Grace, all kinds of different things explored. Those
12 active discussions continued all the way up and through the
13 process that led us to have a term sheet with respect to the
14 prospective plan components.

15 Number two, that process was driven by W.R. Grace,
16 the debtor in this case. It was not driven by me. It was not
17 driven by Mr. Restivo. It was driven by the folks who are
18 sitting here for Grace today, and it was the client that
19 decided what to do and what not to do. This is not a question
20 of lawyers and who's a lawyer here, and this and that and the
21 other. And that kind of observation, frankly, doesn't give
22 credit to the client for being the decision maker. And
23 obviously it doesn't give credit to us either.

24 But in any event, that's not going to get us
25 anywhere. The -- it was Grace, it was and is Grace that's in

1 control and that remains so.

2 Those discussions, to Your Honor's point, have
3 included various kinds of vehicles, including potential
4 inclusion in the plan that has been outlined. We tried very
5 hard to get ZAI into that plan. We tried to get everybody into
6 that plan. And as a consequence, all the different ideas for
7 how to do that, 524(g), claims facilities, criteria, you name
8 it, all the people who were involved in that -- I know that Mr.
9 Lockwood would agree, and I think probably Mr. Westbrook, as
10 well, very versed in different ways at trying to get to a
11 resolution. So, all of that was put on the table, it was all
12 very clear -- carefully gone through.

13 It didn't work. It didn't come to fruition. And I
14 venture to say that one of the major reasons it didn't come to
15 fruition is money. It's financial. A, what money is there?
16 And, B, what money really should be allocated to this given the
17 very substantial problems that do pertain to these claims.
18 These are claims that had no track record of success at all.
19 Not one dollar paid. And, in fact, the Barbanti litigation, to
20 the extent there was a preliminary injunction, came out against
21 the claimant. So, the idea that we should just pay, well, what
22 are we paying for?

23 So, it's a financial issue, and it's a merits issue,
24 and it's a number of people issue, number of claimants issue.
25 That's what the hang-up is. It's not 524(g) and can there be a

1 facility. It is what are the economic dimensions of that
2 facility so that we can go on and deal with all the other
3 matters that are before the Court in this case, and all the
4 other constituencies that have to be taken care of, which then
5 brings me to the following point.

6 Your Honor can order that there be a mediation. And
7 we can get a mediator, and we can all meet. And I know that
8 Your Honor is doing that with respect to the traditional PD
9 claims. And if Your Honor does that, we will be sure to go
10 ahead and have that mediation.

11 It will be my prediction that that mediation will be
12 -- will have a tremendous handicap at the outset. And the
13 handicap will be that all of the different vehicles that are
14 out there have already been considered. And the other -- the
15 other handicap that will be out there is that, again, the
16 predicates for the disagreement before will not have changed,
17 which are financial and are numbers of claimants. That's what
18 the -- that's what the drivers were of the failure to reach
19 agreement before. Why should we expect that they're going to
20 change now that we've got a mediator.

21 And that's what then brings us to the need that we
22 really have. We need -- we have a need for two basic things,
23 and I think that there's a reaction to the fact that we've
24 asked for a bar date. But the bar date, as I can see it, is
25 the only way that we're going to get what we need. What we

1 need is data, reliable data. How many claimants are there?

2 Not extrapolations, not predictions, hard data.

3 In fact, when we went down the road with the
4 estimation of personal injury claims, you'll remember, I know
5 you could never forget, that what drove the greatest amount of
6 time in that case was not the statistical models, although they
7 were very labor intensive. It was getting the data, including
8 through a bar date, including through the submission of a lot
9 of information, that's what then ultimately enabled us to get
10 to the point where we could see what the other side of the coin
11 was.

12 Now, we're not asking that that be done again. We're
13 not asking to have a whole bunch of fancy submissions. And,
14 indeed, you know from the bar date proposal that we made, the
15 claim form is utter simplicity. What we want to get is who are
16 they? Who are the claimants? That is a huge piece of missing
17 data. And when Your Honor suggested that maybe -- and you
18 suggested before, why is there really a difference in view as
19 between both sides? Why can't everybody agree that that's
20 important data to have? The difficulty is that we -- we then
21 said, well, gee, maybe there's a way to think about doing
22 that. What came back on the other side was experts and kind of
23 doing a survey, a survey, or, you know, let's take a telephone
24 poll, we could do a survey in the -- surveys are fraught with
25 problems. They're not hard data, they're not reliable data

1 because what you get depends upon what you ask for. We've
2 litigated surveys in many, many different cases. That's a
3 recipe for more disagreement and for more posturing.

4 What we want is hard underlying data, and the only
5 way to find out who's a claimant is to ask who's a claimant.

6 The second thing that we need -- and we don't think
7 that that's actually going to be very expensive to accomplish,
8 and will give us data that is not only good for purposes of
9 estimation, but you can actually then use to process these
10 claims if the claims ultimately are presented for payment.
11 We'll know who it is that's a claimant, so it's not wasted
12 money.

13 The second thing that we need is a parallel path.
14 The lesson of this case generally, indeed, in each and every
15 phase of this case, that the only way to get to resolutions is
16 to have a parallel path for litigation or estimating or
17 whatever it's going to be. Because it's only when you've got
18 that path that people really can make the hard choices about
19 what it is that they want to do. And that parallel path is
20 critical, not only for purposes of producing resolution of ZAI,
21 that parallel path is important for keeping us on track for the
22 estimation, for the -- for the confirmation process generally.

23 And what I'm very concerned about is that no matter
24 how short of time we get involved in some kind of ordered
25 process of mediation, even if it's 30 days, 45, 60 days, it's

1 30, 45, 60 days off a period of time to confirmation. And,
2 therefore, when we come back and say, well, if we want to
3 settle, which we do, I put it right up there on the board, we
4 want to settle this case, we've always wanted to settle this
5 case, we want to settle, we want to settle. I'll say it a
6 zillion times, we don't need a mediator to tell us that we want
7 to settle the case. We understand that. We want to settle the
8 case.

9 But if we want to get the case resolved or estimated
10 so that we can get to a confirmation that keeps this package
11 together, and keeps this case on track to get resolved,
12 something's got to happen. And by doing the mediation, we
13 aren't going to change the levers from making that happen. So,
14 we do think we need the bar date, and we do -- we think we need
15 a process that says following the bar date, we're going to be
16 back here in court if we can't reach agreement to actually do
17 think that may not all be, you know, pleasant and ducky, but
18 they've got to get done because there's way too much to lose in
19 this case. We can't bank on a cooperative settlement of
20 process alone to get us to where we want to be.

21 I think that the bar date has been out there. We
22 moved for a bar date before. We put together a whole notice
23 program that essentially wasn't contested in terms of process
24 and reach before. The notice itself was -- there was a debate
25 about the notice. The notice that we got here is pretty much

1 the same as the notice we had before.

2 Remember the notice issue before was not the
3 description or anything, just did you -- do you include some
4 kind of statement about the risks, et cetera, et cetera? Well,
5 we're over that one now. So, the content of the notice
6 shouldn't be a problem. So, that's why we're here.

7 And what I would propose to the Court is let's get
8 the bar date set. Let's get the notice out. If Your Honor
9 wants to -- we have greater satisfaction that all steps to
10 resolve the case are being taken, we are completely happy to
11 have some kind of mediated process. I say that not knowing
12 whether my client's going to agree with it, but I think that
13 they will. That's not an issue. But we've got to have data
14 and we've got to have a parallel track.

15 When it comes to the Canadians, I -- you know, I'm
16 not sure what the issue really is. We are happy to have the
17 Canadians included in the process, indeed, there were very
18 active, advanced settlement discussions with Canadian ZAI
19 claimants that broke down. But we actually expected that there
20 was going to be a deal with ZAI claimants in Canada. There's
21 no reluctance to proceed with that, we'd be happy to have that
22 process take place.

23 In Canada, we believe that it really is parallel.
24 That they -- we can set up a process in Canada that is parallel
25 to what we have here. So, we have a Canadian bar date, people

1 come in in response to the Canadian bar date. We don't have to
2 is there and scratch through a bunch of records to figure out
3 whether the stuff is still there. We'll know whether we have
4 claimants or not. Totally on board with doing that in Canada.
5 That may have to lag a little because the other one is a little
6 bit further advanced.

7 But would really, really strongly urge Your Honor,
8 now that we're here, let's not let go of the schedule here.
9 Let's keep on track, let's get the bar date done, let's get it
10 done. We'd ask the Court issue the order so that we can have
11 the notice issue within whatever it is, 30 days, and get the
12 process going. And we can have all the discussions that
13 anybody would want.

14 The only thing that gets lost in that process is the
15 estate spends the money to get the bar date notice out. And
16 given where we are in this case, that's not insignificant
17 money, but it's money that's been proven three different times
18 to have yielded results when it comes to litigation in this
19 case. That is money that is extremely well spent.

20 So, Your Honor, I don't know if you -- I know that
21 we're tied up for time, but we would be very, very reluctant to
22 have this bar date issue deferred. We believe -- and if Your
23 Honor needs to set a special time for a further proceeding, the
24 debtor very, very strenuously and vigorously, in service of
25 getting to confirmation in January, consistent with the terms

1 sheet, wants there to be a bar date.

2 Your Honor then can decide what it is that we're
3 going to do with the information. But we've got to have a bar
4 date.

5 THE COURT: Okay. Go ahead, Mr. Westbrook -- just a
6 second.

7 (The Court conferring off the record with staff)

8 MR. WESTBROOK: No, Your Honor, and we're not --
9 we're not intruding on that. I have two minutes, Your Honor,
10 that's all. And I would not stand except Mr. Bernick --

11 THE COURT: Well, Mr. Westbrook, excuse me. What
12 else are we going to be doing after this issue?

13 MR. WESTBROOK: Going home.

14 THE COURT: Going home?

15 MR. WESTBROOK: I wouldn't -- I wouldn't cancel a
16 cab, Your Honor, I have two minutes.

17 THE COURT: Anybody else speaking after this?

18 UNIDENTIFIED ATTORNEY: Just one comment after that,
19 Your Honor.

20 THE COURT: Cancel the cab.

21 UNIDENTIFIED ATTORNEY: Don't say that, then there
22 will be more.

23 (Laughter

24 MR. WESTBROOK: Your Honor --

25 THE COURT: Go ahead, Mr. Westbrook.

1 MR. WESTBROOK: I only -- I only rise because Mr.
2 Bernick felt it necessary to put his toe into the stream of
3 settlement negotiations and a little bit behind the scene. I
4 will say only one thing about that, Your Honor, that is that we
5 were not involved -- we were not invited to the last round of
6 settlement negotiations.

7 In fact, as -- as those on Grace's side know, perhaps
8 not Mr. Bernick, that a certain PI lawyer who was at those
9 negotiations new ZAI's positions and parameters on which we
10 could resolve it and his report was that he was not able to
11 engage Grace in any discussions. That's all I'll say on that
12 point, Your Honor. I didn't want to leave any impression that
13 we haven't been trying to get this resolved.

14 Your Honor --

15 MR. BERNICK: Maybe he's at fault because that's not
16 what (indiscernible).

17 MR. WESTBROOK: I don't want to get into that, Your
18 Honor.

19 THE COURT: All right. Well, in any event, it's
20 water over the dam at this point. At this point in time, the
21 PI issues are resolved. So, the debtor has a pretty good
22 handle with respect to the environmental liabilities it's been
23 settling and what context the environmental liabilities are
24 left to settle. It knows pursuant to the PI settlement what
25 property damage issues are out there. I don't know

1 specifically what its estimate for how much it's going to have
2 to reserve to take care of those property damage issues are,
3 but obviously it's got some amounts in mind.

4 So, the reality is that in order to keep the debtor
5 functioning and contributing to the trust and operating a
6 business and making money, there are always limitations on
7 resources. You know, there has to be limitations on resources
8 and people have to take haircuts. It just has to happen.
9 People don't get paid lots of dollars in bankruptcy dollar
10 terms.

11 So, to be realistic about this, people have to
12 realize it's not going to be a huge pot of money that is going
13 to pay a lot of claims when the Court's already determined
14 there isn't an unreasonable risk of harm, but obviously if
15 you've got, at some point in time, to remediate a home, there
16 is going to be a cost involved. And to the extent that
17 somebody can show that it's ZAI in a home and there will be a
18 charge, there is going to be a cost.

19 So, if you want to do a notice program as the
20 Barbanti class action talks about, there will be a cost. If
21 you want to do a remediation type program, there will be a
22 cost. If you want to try to do a combination program, there
23 will be a cost. But it's finite dollars, that's the problem,
24 it's finite dollars.

25 Now, you know, you've got -- there are only so many

1 dollars that can go around. If you want to get this settled,
2 you'll get it settled. If the case ends up in liquidation,
3 there isn't going to be anything for anybody. So, you know,
4 where are you going, folks? Why are you not sitting down at
5 the table and having some meaningful settlement discussions? I
6 don't get it.

7 MR. WESTBROOK: We certainly understand, Your Honor,
8 and we're certainly willing to do that. And I will only say
9 that as to the bar date issue, if we get back on track -- if
10 things should break down, that we do think that the Court
11 should stay on track with the ZAI opinion, claims next, the
12 class certification issue, and we can get those litigated. But
13 we're willing to also engage the Canadian folks in some
14 discussions, Your Honor, and see if we can put something
15 jointly together. We think Your Honor's (indiscernible) idea
16 is maybe the way that we can finally cracked.

17 THE COURT: All right. With respect to -- let me
18 address one thing, Mr. Westbrook, with respect to the
19 possibility of a bar date. Because it seems to me that the
20 debtors' construct of the bar date does not foreclose the
21 concept of class action proof of claims, class -- pardon me.
22 Class proofs of claim either. And so if I provide some very
23 brief period of time without issuing a bar date notice to try
24 to get this settled, and it will be brief, then I am inclined
25 to think that a bar date probably needs to be set. And I think

1 it probably has to be set before some class notice goes out. I
2 am still of a mind that perhaps some class notice of 524(g)
3 cannot be utilized, may be appropriate, but I think it's going
4 to have to be in conjunction with or after some bar date
5 notice. Because I think the notice program that the debtor is
6 contemplating -- and I'm not making findings about it, but in
7 construct, should work.

8 Now, for Canada, it may need some tweaks. The debtor
9 can work with the Canadians in terms of the language issues and
10 so forth. But in the United States, for the most part, it's a
11 pretty extensive bar date program.

12 So, it should be sufficient to advise people that if
13 they want to take a look or have somebody do it for them at
14 what's in their attic, and find out whether they've got this
15 particular type of insulation there, that they've got to file a
16 claim. And depending on what happens with respect to those
17 claims, then it may still be appropriate to have a class or
18 classes, I'm not sure at this point in time how all that would
19 work to address the issues.

20 So -- but I still think that it may be worth first,
21 starting with the bar date. So, while you're out talking, I
22 think you folks had better perhaps include that in your
23 discussions.

24 MR. WESTBROOK: We will, Your Honor. And we
25 understand that before the Court would do that, we'd have an

1 opportunity to come talk about all the things Mr. Baena wants
2 to talk about --

3 THE COURT: Yes, sir.

4 MR. WESTBROOK: -- and all the other issues we have
5 about a bar date.

6 THE COURT: Yes, sir.

7 MR. WESTBROOK: Thank you, Your Honor.

8 THE COURT: Mr. Hogan?

9 MR. HOGAN: Briefly, Your Honor. It just relates to
10 the notice component of the bar date. And that is the debtors
11 indicated that they vigorously want a bar date set. They also,
12 in their application for that bar date, indicated that they
13 preferred actual notice. And they also requested that as to
14 individual plaintiffs' attorneys that had information regarding
15 the location of those individuals, that they be mandated to
16 bring that information forward. And I just wanted to ask that
17 that -- that applied to the Canadian Government, as well,
18 insofar as we understand that they have a significant database
19 that represents exactly which properties have Zonolite in it
20 and that would be very useful from the Canadian Zonolite
21 claimants' perspectives.

22 THE COURT: Mr. Monaco?

23 MR. MONACO: Your Honor, I had not intended to get
24 into this kind of detail, but I feel compelled to respond.
25 First of all, Your Honor, it's going to have to be a best

1 efforts type of -- we don't want to be the subject of -- of an
2 order that compels us to file things. We need to use best
3 efforts to the extent that we are going to provide these
4 documents.

5 The other -- the other aspect of this Your Honor
6 should be aware of is that we do have information and it is
7 voluminous and it is located in a number of different areas,
8 and it would take us a very long time to get it together. So,
9 the parties need to understand that, and that's something we'll
10 have to deal with in terms of the detail of any kind of bar
11 date order.

12 **(AUDIBILITY IS POOR - MR. BERNICK'S IS NOT AT A FUNCTIONING**
13 **MICROPHONE -- AT TIMES INDISCERNIBLE)**

14 MR. BERNICK: Your Honor, if I could add as a
15 facilitator of the process (indiscernible).

16 (Laughter)

17 THE COURT: That was sweet, Mr. Westbrook.

18 MR. BERNICK: When we tried the police case many
19 years ago, you said the same thing.

20 (Laughter)

21 MR. BERNICK: If we could, I think, just advocate in
22 favor of having the discussion about what's the real world, I
23 think to the extent that we've got information so that we can
24 provide better notice then that's fine. But I also agree that
25 we're operating within a time frame here that doesn't enable us

1 to uncover every single (indiscernible) out there and due
2 process doesn't require it. It requires (indiscernible).

3 So, what I would suggest is that we have a three-way
4 conversation, if that's okay with you guys, and see what we can
5 work out. I think everybody's aiming in the right direction.

6 MR. MONACO: That's fine, Your Honor.

7 THE COURT: That I agree with. You know, I think --
8 I'm not -- I do not want to hold up a notice program of any
9 type, including for disclosure statement and plan purposes
10 because you're going to have the same issue in terms of getting
11 notice out to everyone at that time, even if it's not for ZAI
12 special notices anyway. So, I think at this point, we're going
13 to have to have this discussion anyhow.

14 So, I think a reasonable notice process is all that
15 is required for actual -- for a search to find actual claimant,
16 perhaps, Mr. Monaco, your client might be able to get started
17 on putting together what types of processes would be
18 appropriate to identify claimants, to the extent that it can.
19 And that may be a good thing for, Mr. Westbrook, you and Mr.
20 Scott, to the extent that you know available ZAI claimants and
21 known claimants, too. Because one thing I am not going to do
22 is back off any order that I make this time that says that
23 claimants have to provide information to the debtor. That
24 caused way too many problems the last time with respect to the
25 personal injury issues. So, if there is an order that goes out

1 that says that to the extent that a package goes out and
2 someone provides it a client, that information has to be
3 provided to the debtor or the debtor doesn't have to give
4 actual notice, we're going to have that discussion at the next
5 hearing, and that order is not going to be modified. So, if
6 anybody's going to have an objection to telling the debtor who
7 the actual clients are so that the debtor provides actual
8 notice, tell me about it at the next hearing. Because right
9 now, that seems like a darn good idea based on my view
10 originally and the District Court opinion, looking at the
11 actual notice issues last time.

12 MR. BERNICK: Can we talk maybe about the timing
13 here? I think --

14 THE COURT: Yes.

15 MR. BERNICK: -- (indiscernible).

16 THE COURT: Yes, that's what I wanted to get to, too.
17 Do you folks really need a mediator? Or can you sit down
18 together and have a discussion with the business folks involved
19 and say, look, this is our data, this is what we think the
20 universe of houses, claims, whatever it is that you're going to
21 provide is, and why we think we have a -- I'm just going to
22 pick a wild number -- you know, a database of 500,000 homes
23 that have ZAI, which means a potential claimant base of, you
24 know, a million people that may, at some point over the next 50
25 years, provide claims against Grace, and Grace will provide us

1 -- say, you know, this is it, x dollars is all we have. You
2 can do what you want with it, but this is what we provide.
3 However it's going to work. Can you sit down and do that
4 together, or do you need a mediator?

5 **(AUDIBILITY IS POOR - MR. WESTBROOK IS NOT AT A FUNCTIONING**
6 **MICROPHONE -- AT TIMES INDISCERNIBLE)**

7 MR. WESTBROOK: Your Honor, I've settled many, many
8 cases for Grace for a lot of dollars over the years, and --

9 **(MR. WESTBROOK APPROACHES MICROPHONE)**

10 MR. WESTBROOK: -- up to this point, we've always
11 been able to get this done. In this particular circumstance,
12 Your Honor, I think there might be some benefit of having a
13 respected mediator there who can either tell us we're crazy
14 about something, or perhaps tell Grace that it's off base on
15 something. If they'll listen. I mean if they're not going to
16 pay any attention anyway, don't waste the money on a mediator.
17 But we're certainly willing to do it either way. But I would --
18 if I were asked to choose, I'd say I'm tipping slightly for
19 getting a distinguished mediator who can talk some sense into
20 both sides.

21 THE COURT: Okay. Well, that's the key. Is the
22 other side willing to listen, too?

23 **(AUDIBILITY IS POOR - MR. BERNICK'S IS NOT AT A FUNCTIONING**
24 **MICROPHONE -- AT TIMES INDISCERNIBLE)**

25 MR. BERNICK: I'm prepared, and Grace is prepared to

1 accept the idea.

2 UNIDENTIFIED ATTORNEY: We're prepared.

3 MR. BERNICK: They're all -- they're prepared,
4 they're ready to go, laws a little different in Canada. But
5 the -- I think everybody's -- I don't get any sense that people
6 are not proceeding here in good faith, Your Honor. I think
7 there's a difference of opinion. If they -- if they would feel
8 more comfortable having a mediator, we don't have a problem
9 with that as long as we can get it done. If it doesn't alter
10 the time table -- we don't think we need a mediator, but we're
11 happy to accommodate them --

12 THE COURT: All right.

13 MR. BERNICK: -- (indiscernible).

14 THE COURT: Are you folks going to be able to agree
15 on a mediator who can get up to speed rapidly?

16 MR. WESTBROOK: I don't think that would be a point
17 of disagreement, Your Honor. We could probably agree on
18 somebody.

19 THE COURT: Mr. Hogan, do you think so?

20 MR. HOGAN: I think we could, Your Honor.

21 THE COURT: Okay. Mr. Bernick?

22 MR. BERNICK: I would hope, yes.

23 THE COURT: All right. Then how much time, three
24 weeks?

25 UNIDENTIFIED ATTORNEY: That sounds fine.

1 UNIDENTIFIED ATTORNEY: Fine, Your Honor.

2 THE COURT: I mean you've been talking for, you know,
3 nearly two years. So, it seems to me -- I know you haven't,
4 Mr. Hogan, but --

5 MR. HOGAN: Well, not ZAI, Your Honor, but is it
6 three weeks to have the mediation or three weeks --

7 THE COURT: Yes.

8 MR. HOGAN: Okay, I just wanted to be clear on that.

9 THE COURT: Three weeks to have the mediation.

10 MR. HOGAN: So, the agreement as to the mediator's
11 going to have to happen within the next week, I would say.

12 THE COURT: Oh, I would say by tomorrow.

13 MR. HOGAN: Yeah.

14 (Laughter)

15 THE COURT: Yes.

16 MR. BERNICK: That's -- that's fine.

17 THE COURT: Mr. Monaco?

18 MR. MONACO: Your Honor, I just want to make the
19 record clear that we -- we will participate also to get this
20 done.

21 THE COURT: All right. Okay. Do you -- are you
22 going to need an appointment order for a mediator if you agree
23 on who the mediator is, whether I get an appointment order
24 signed tomorrow or not. To my -- my way of thinking is
25 irrelevant, you can present one later, that's fine. I'll sign

1 one later.

2 MR. BERNICK: That's fine with us, Your Honor.

3 THE COURT: All right. The terms and conditions will
4 be the normal --

5 MR. BERNICK: Yes.

6 THE COURT: -- terms and conditions for appointment,
7 but the mediator will have to substantiate that he or she is
8 disinterested within the meaning as you all will understand
9 that to be. Okay? That provides three weeks. The next
10 omnibus is June 2nd in Pittsburgh.

11 MR. BERNICK: Right, yes.

12 THE COURT: Okay. Is that a fair time table? We
13 address this issue again June 2nd. If there is no settlement,
14 then we will argue the bar date objections specifically because
15 I will, at that point in time, be prepared to make rulings with
16 respect to a bar date. So, Mr. Baena, I'll hear your line item
17 objections, whatever it is that you wish to bring, and anybody
18 else's, as well.

19 Mr. Scott, I will probably not address the class
20 claim issue at that time because I think I'm going to want to
21 get it either re-briefed, if you need to update the briefs, but
22 definitely I'm going to want full briefs and take a look at it
23 and have it reargued. But I prefer to get through the bar date
24 issue first. I don't see the two as inconsistent with each
25 other, I think they can be juxtaposed.

1 MR. BERNICK: That's fine with us.

2 THE COURT: All right.

3 MR. BERNICK: So, we'll simply continue the matters
4 that we talked about today until the next omnibus.

5 THE COURT: On June 2nd.

6 MR. BERNICK: Except -- except the class where -- I
7 guess we're going to hear from the Court --

8 THE COURT: The schedules.

9 MR. BERNICK: The schedules.

10 THE COURT: Yes. We will discuss the schedule for
11 adjudicating your issue, Mr. Scott, on June 2nd. So, perhaps
12 you can discuss that with the debtor in the meantime.

13 Okay. All right. As to the relief from stay
14 request, I haven't heard argument from anybody. That is not
15 likely to be granted on behalf of any ZAI claimant. I will
16 hear any argument you choose to make on June 2nd, but you'd
17 better come up with something more than what you've got in your
18 brief so far. So, that is not too likely to be granted.

19 Okay. Anything more? Mr. Hogan?

20 MR. HOGAN: Your Honor, just an -- just an
21 administrative matter. Because we were brought into this so
22 late as to these various controversies, and I filed my motions,
23 I believe I filed my response to the bar date and the 54(b)
24 motion. I filed a motion for leave, and those orders haven't
25 been signed.

1 THE COURT: They will be.

2 MR. HOGAN: Thank you, Your Honor.

3 THE COURT: Okay. I'll make a note.

4 MR. BERNICK: And we'll be in immediate contact
5 (indiscernible) represent the Canadians (indiscernible).

6 THE COURT: Yes, Mr. Monaco, Mr. Hogan, and Mr.
7 Baena.

8 MR. BERNICK: Thank you.

9 THE COURT: Anyone else need to be involved in that
10 mediation discussion?

11 (No audible response heard)

12 THE COURT: Okay, folks.

13 MULTIPLE SPEAKERS: Thank you.

14 THE COURT: All right. We're adjourned. Thank you.

15 (Proceedings Adjourn at 1:23 P.M.)

16 C E R T I F I C A T I O N

17
18 I, Karen Hartmann, certify that the foregoing is a
19 correct transcript to the best of my ability, from the
20 electronic sound recording of the proceedings in the above-
21 entitled matter.

22
23 /s/ Karen Hartmann Date: April 26, 2008

24 TRANSCRIPTS PLUS

25

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